Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Revision of the Commission's Program Access Rules	)	**MB Docket No. 12-68**

To: The Commission

REPLY COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION

The American Public Power Association (APPA) respectfully submits these reply comments in response to the Federal Communications Commission (FCC)'s *Further Notice of Proposed Rulemaking* (*FNPRM*) in the above captioned proceeding. The FCC seeks comment on whether it should establish certain rebuttable presumptions for particular types of program access complaints, and make additional procedural modifications to its program access rules in order to better preserve and protect competition in the distribution of video programming.

As discussed below, APPA concurs in the overwhelming support for the adoption of rebuttable presumptions that exclusive contracts between cable operators and affiliated regional sports networks (RSNs) and other types of must-have marquee programming are "unfair acts" in violation of Section 628(b) of the Communications Act, 47 U.S.C. § 548(b). In addition, in recognition of the comparative lack of negotiating power of small cable systems, the Commission should adopt a blanket rebuttable presumption that all exclusive program contracts are unfair acts when imposed against small cable systems. Further, to adequately protect consumers' continued access to such programming, the Commission should also establish a rebuttable presumption that a

complainant is entitled to a standstill to ensure continued carriage when challenging such exclusive contracts.

Given the sudden and dramatic change in the Commission's program access framework as a result of its recent *Sunset Order*[1] eliminating the prohibition on such exclusive contracts, it is imperative that the Commission implement reasonable protections to preserve and protect competition in the multichannel video program distributor (MVPD) marketplace. This is particularly true for small, new competitive entrants. These same measures are also important in helping to meet the Commission's national broadband deployment policy goals.

I. INTRODUCTION

APPA is a national service organization representing the interests of more than 2,000 publicly-owned, not-for-profit electric utilities located in all states except Hawaii. Many of these utilities developed in communities that were literally left in the dark as electric companies in the private sector pursued more lucrative opportunities in larger population centers. Residents of these neglected or underserved communities banded together to create their own power systems, in recognition that electrification was critical to their economic development and survival. Public power systems also emerged in several large cities – including Austin, Cleveland, Jacksonville, Los Angeles, Memphis, Nashville, San Antonio, Seattle, and Tacoma – where residents believed that competition was necessary to obtain lower prices, higher quality of service, or both. Currently, approximately 70 percent of APPA's members serve communities with less than 10,000 residents. At present, over 100 public power systems provide cable television services.

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[1] *In the Matter of Revision of the Commission's Program Access Rules, Report and Order*, MB Docket No. 12-68, adopted October 5, 2012 ("*Sunset Order*").

The patterns that marked the evolution of the electric power industry are now repeating themselves in the communications industry. As incumbent private communications providers focus on establishing or further entrenching themselves in large population centers, many smaller communities are at risk of falling behind in obtaining the full benefits of the Information Age. These benefits include vigorous economic development, rich educational and occupational opportunity, affordable modern health care, and high quality of life. In response, municipal utilities around the country once again have come together to serve their communities by deploying sophisticated broadband communications networks capable of providing video, voice and data services, including some of the only fully operational, community-wide, fiber to the home (FTTH) networks in the nation. Many of these networks are the result of public-private partnerships. In order for these networks to survive and fulfill the promise of meaningful competition, they need to be able to offer their consumers a full slate of video choices that is comparable to that provided by their incumbent multiple system operator (MSO) competitors.

II. THE COMMISSION SHOULD ADOPT REBUTTABLE PRESUMPTIONS THAT EXCLUSIVE CONTRACTS ARE UNFAIR

A. Background

As originally enacted, Section 628(c)(2)(D) of the Communications Act prohibited MVPDs from entering into exclusive contracts with video programming vendors in which they have attributable ownership interests. Pursuant to Section 628(c)(5), the exclusivity ban was scheduled to sunset on October 5, 2002, unless the Commission determined that the ban "continue[d] to be necessary to preserve and protect competition and diversity in the distribution of video programming." Based on its

assessment of the nature and status of competition in the video programming and distribution markets, the Commission extended the prohibition for two additional five-year periods, finding that retention of the exclusivity prohibition was necessary to preserve and protect competition.

In its recent *Sunset Order*, however, the Commission lifted the ban on exclusive contracts, finding that, under current market conditions, "a preemptive prohibition on exclusive contracts is no longer necessary to preserve and protect competition and diversity in the distribution of video programming."

A key factor of the Commission's decision to allow the exclusivity ban to sunset was its finding that competitive MVPDs would retain the ability to seek relief under other provisions of the program access rules on a case-by-case basis. In particular, the FCC pointed to the following statutory protections: Section 628(b) of the Act, which broadly prohibits "unfair practices" that hinder significantly or prevent any MVPD from providing satellite cable programming; Section 628(c)(2)(B), which prohibits discrimination (including unreasonable refusals to deal) among MVPDs; and Section 628(c)(2)(A), which prohibits a cable operator from "unduly or improperly influencing" the decision of an affiliated programmer to enter into a carriage agreement with an MVPD. Moreover, the FCC noted that it retains residual authority under Section 628(b) to monitor marketplace developments and the impact of ending the exclusivity ban and can adopt new rules to protect consumers and competition if necessary.

B. An Overarching Need to Protect Competition Remains

As the Commission moves forward in adopting new rules, APPA urges the Commission to recognize that any growth that it has found in the development of MVPD competition has not fundamentally altered the market structure and conditions in the

video programming market that led Congress to adopt the exclusivity prohibition in 1992, and led the Commission to extend that limitation in 2002 and 2007. While the market share of the major MVPDs may have declined somewhat, that has not obviated the need for protections against the competitive harms of exclusive contracts. Quite simply, the large multi-system operators continue to dominate the video marketplace, particularly in markets where they compete with small local entities.

Programming access is critical to viable competition. Congress and the Commission have long recognized the direct linkage between access to programming and competition. Absent the ability to obtain programming pursuant to Section 628, there is little doubt that Direct TV, Echo Star, AT&T, or Verizon would not have entered into the MVPD market. This is also certainly true for public cable systems. Despite the beachhead that these competitors have made in providing competitive video services, large powerful MVPDs continue to have dominant influence over "must have" cable programming, without which competitors cannot survive in the market.

Moreover, while the *FNPRM* focuses on the potential impact of its proposed rules in the context of video service competition, the Commission should also consider the impact of the lack of access to RSNs and other marquee programming would have on the national goal of accelerating broadband deployment, adoption, and use. As the Commission has repeatedly recognized, as in its *Terrestrial Order*, "by impeding the ability of MVPDs to provide video service, unfair acts involving [video service] can also impede the ability of MVPDs to provide broadband services. Allowing unfair acts involving [video service] to continue where they have this effect would undermine the goal of promoting the deployment of advanced services that Congress established as a

priority for the Commission. This secondary effect heightens the urgency for Commission action."[2]

In its National Broadband Plan, the Commission announced a national goal of achieving 100 megabits to 100 million households by 2020 as part of its National Broadband Plan.[3] In describing this goal, Chairman Julius Genachowski stated that the United States should also seek to push past 100 Megabits as fast as possible.

> The U.S. should lead the world in ultra-high-speed broadband testbeds as fast, or faster, than anywhere in the world. In the global race to the top, this will help ensure that America has the infrastructure to host the boldest innovations that can be imagined. Google announced a one gigabit testbed initiative just a few days ago – and we need others to drive competition to invent the future.[4]

Some of APPA's members are already providing ultra-fast broadband connectivity at 100 Mbps – nearly a decade ahead of the Commission's proposed national goal – and many others will be capable of doing so long before 2020. These systems will increasingly provide multiple benefits to their communities and the Nation, including support for robust economic development and global competitiveness, educational opportunity, public safety, homeland security, energy efficiency, environmental protection and sustainability, affordable modern health care, quality government services, and the many other advantages that contribute to a high quality of life.

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2 *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, ¶ 36, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (footnotes omitted).

3 *Connecting America: The National Broadband Plan*, Federal Communications Commission, released March 16, 2010, http://www.broadband.gov/plan/.

4 Julius Genachowski, "Broadband: Our Enduring Engine for Prosperity and Opportunity," as prepared for delivery at NARUC Conference, February 16, 2010, http://tinyurl.com/yc6j2l8.

For all this to occur, however, APPA's member utilities must be able to pay for their systems. To do that, they must be able to provide, or support the provision, of all major communications services, including video services. They must, therefore, have fair and reasonable access to national and regional video programming.

Accordingly, now that the Commission has removed the ban on exclusive contracts, the Commission must take actions to maximize the effectiveness of the complaint process in preserving, protecting, and promoting competition and diversity in the video distribution market. The adoption of the Commission's proposed rebuttable presumptions are important steps in ensuring that these statutory obligations are met.

C. The Commission Should Adopt a Rebuttable Presumption That Exclusive Contracts Between Cable Operators and Affiliated RSNs Are an Unfair Act Under Section 628(b).

As indicated, a complainant filing a program-access claim under Section 628(b) must now demonstrate, on a case-by-case basis, that an exclusive contract (1) is an "unfair act" that (2) has the "purpose or effect" of "significantly hindering or preventing" the complainant from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

As applied to RSNs, however, the FCC adopted a rebuttable presumption. Finding that access to cable-affiliated RSNs is often essential to a competitor's viability, the FCC adopted the rebuttable presumption that exclusive contracts involving RSNs meet the "significant harm" criterion noted above.

Having adopted a rebuttable presumption that exclusive contracts between cable operators and affiliated RSNs cause significant harm, the Commission now inquires as to whether it should find such exclusive contracts are an "unfair act" under Section 628(b). APPA concurs with the majority of commenters that argue that the Commission can —

and should — adopt a presumption that exclusive contracts between a cable company and its affiliated RSN are "unfair" in violation of Section 628(b) and the Commission's program access rules.

As Verizon notes, the Commission itself has held that "[d]etermining whether challenged conduct is 'unfair' requires balancing the anticompetitive harms of the challenged conduct against its procompetitive benefits."[5] The Commission — through this proceeding, prior rulemaking proceedings, and complaint proceedings — has amassed an extensive record that meets both conditions for establishing a rebuttable presumption.

In its *Sunset Order*, the Commission has stated that exclusive contracts between cable operators and programmers may theoretically have the following pro-competitive benefits: (i) increased product differentiation, by both cable operators and their MVPD competitors; and, (ii) increased investment in and promotion of new programming, by both cable operators and their MVPD competitors. At the same time, the Commission also found that those potential pro-competitive benefits of exclusive contracts are generally outweighed by the contracts' anticompetitive harms, unless the programming at issue is replicable or not highly desired by consumers.[6]

Applying those balancing principles to exclusive contracts involving cable-affiliated RSNs, the Commission has repeatedly held that the anticompetitive harms typically outweigh the pro-competitive benefits, specifically finding that "when programming is non-replicable and valuable to consumers, *such as regional sports*

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5 Verizon citing *Verizon v. Madison Square Garden, Memorandum Opinion and Order,* File No. CSR-8185-P, November 10, 2011.

6 *AT&T v. Madison Square Garden, Memorandum Opinion and Order*, File No. CSR-8196-P, November 10, 2011.

programming, no amount of investment can duplicate the unique attributes of such programming."[7]

In short, because RSNs are non-replicable and of extremely high value, no amount of programming differentiation or investment can counterbalance the severe harm to competition caused by exclusive contracts. Accordingly, the Commission should adopt a rebuttable presumption that exclusive contracts for RSN programming between cable companies and their affiliates are "unfair" for purposes of Section 628(b).

Absent such a finding, vertically-integrated MVPDs and their affiliated video programing vendors will have the means and the incentive to use exclusive contracts to frustrate competition. This is particularly true with respect to small, new competitive entrants such as municipal systems that do not have the size or scale to develop effective counter-programming to RSNs nor the resources to file expensive and time-consuming complaints with the Commission in the absence of such presumptions. This is particularly true if they must file separate complaints for each program that their viewers may value, either on a stand-alone basis or in the aggregate.

D. The Commission Should Establish a Rebuttable Presumption that a Complainant Challenging an Exclusive Contract Involving a Cable-Affiliated RSN Is Entitled to a Standstill of an Existing Programming Contract During the Pendency of a Complaint.

In its *2010 Program Access Order*, the Commission established a process whereby a complainant may seek a standstill of an existing programming contract during the pendency of a complaint.[8] Under the Commission's existing rules, the complainant

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[7] *Id*., at ¶ 32 (*emphasis* added).

[8] *See 2010 Program Access Order*, 25 FCC Rcd at 794-97, ¶¶ 71-75; *see also* 47 C.F.R. § 76.1003(l).

has the burden of proving that a standstill will meet the following four criteria: (i) the complainant is likely to prevail on the merits of its complaint; (ii) the complainant will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and, (iv) the public interest favors grant of a stay. *See* 47 C.F.R. § 76.1003(l).

APPA joins other commenters in supporting the Commission's proposal to establish a rebuttable presumption that a complainant challenging an exclusive contract involving a cable-affiliated RSN is entitled to a standstill of an existing programming contract for that RSN during the pendency of a complaint. If, as proposed, the Commission establishes a rebuttable presumption that exclusive contracts between a cable operator and an affiliated RSN are "unfair acts," it necessarily follows that the Commission should likewise adopt a rebuttable presumption that an MVPD complainant challenging such an exclusive contract is entitled to a standstill of an existing RSN contract during the pendency of the complaint. Indeed, as AT&T notes,

> [T]he "unfair act" presumption, when combined with the pre-existing "significant hindrance" presumption, would require the Commission to presume (on a rebuttable basis) satisfaction of the first, second, and fourth factors of the four-factor test described above, and the third factor will usually be clearly met, as well.

E. The Commission Should Adopt the Same Rebuttable Presumptions And Standstill Presumptions for Complaints Involving Cable-Affiliated National Sports Networks as for Complaints Involving Cable-Affiliated RSNs.

APPA urges the Commission to adopt the above-described rebuttable presumptions concerning "unfair acts" and "significant hindrance" for complaint proceedings with regard to an exclusive contract between a cable operator and an affiliated "national sports network." Similarly, APPA recommends that such complaints

also be entitled to a rebuttable presumption with respect to the grant of a request for a standstill of existing contracts during the pendency of the complaint.

Given the unique and non-replicable nature of sports programming, the Commission should establish rebuttable evidentiary presumptions for complainants bringing cases under Section 628(b) not only for cases involving access to cable-affiliated RSNs, but also for complaints involving access to cable-affiliated national cable sports networks. As the United States Telephone Association notes, just as sports programming content on RSNs is highly valuable and non-replicable, national sports programming networks generally contain marquee sports programming of tremendous interest to consumers. National cable networks air sports content from the same professional and college sports leagues as RSNs, and, as a result, both such networks air non-replicable content. Accordingly, national sports programming networks should be treated in a similar manner as RSNs given their inherent competitive value. At the very least, as discussed below, APPA believes that such rules and rebuttable presumptions should apply to small cable systems, as such programming is vital to them and they generally do not have the means or scale to replicate it.

F. The Commission Should Establish a Rebuttable Presumption Against Exclusive Contracts Previously Found to Be Impermissible

APPA agrees with other commenters that the Commission should adopt a rebuttable presumption that where an exclusive contract for a cable-affiliated network has previously been held to violate Section 628, then another exclusive contract with the same programming network would also violate Section 628. As CenturyLink notes, a finding that a cable operator's previous exclusive contracts were unfair and significantly

hindered competition is a strong predictor that its current exclusive contract with a program network is impermissible under Section 628.

Such a rebuttable presumption is reasonable as it would spare complainants the time and expense of developing similar evidence to that which the Commission already found to be conclusive evidence of an impermissible act.

G. The Commission Should Adopt a Rebuttable Presumption That Exclusive Contracts Between Cable Operators and Any Affiliated Programmer Is an Unfair Act Under Section 628(b) When Enforced Against a Small Cable System

In recognition of their vastly disproportionate resources, the Commission should adopt a blanket rebuttable presumption that all exclusive program contracts between cable operators and affiliated programmers are unfair acts when enforced against small cable systems. For purposes of such a rule, the Commission should define a "small cable system" as a system that inclusive of all affiliates has less than 50,000 subscribers. Absent such a blanket rebuttable presumption, small cable systems will not have the financial resources to undertake the evidentiary and legal investigation necessary to demonstrate that an MSO has undertaken an unfair act. This is particularly true given the ability of an MSO to enter into multiple exclusive contracts with affiliated programmers and thereby potentially subject a competing small cable system to the impossible choice of attempting to compete without comparable programming, or potentially bankrupting itself litigating multiple complaints. Nor do small systems have the resources to develop programming that replicates such national programming or provides a meaningful substitute. Accordingly, absent such a rebuttable presumption against such exclusive contracts, small cable systems will be at a severe competitive disadvantage, which as

discussed above, will not only negatively impact their video service offerings, but will impact the viability of their broadband services.

III. TREATMENT OF BUYING GROUPS

The *FNPRM* also seeks comment on whether the Commission should amend its program access rules in several respects with regard to the treatment of "buying groups."

A. The Commission Should Amend Its Definition of a Buying Group to Include the Proposed Alternate Liability Option

APPA joins the American Cable Association (ACA) in supporting a revision of the Commission's definition of a "buying group" to accurately reflect the level of liability assumed by buying groups under current industry practices. As the ACA observes, the current liability requirements have had the unintended effect of barring some groups from availing themselves of program access protections. The Commission should therefore revise the definition of a buying group in Section 76.1000(c)(1) to require, as an alternative to the current liability options, that the buying group agrees to assume liability to forward all payments due and received from its members for payment under a master agreement to the appropriate programmer.

B. The Commission Should Amend Its Rules to Clarify the Standard of Comparability for Buying Groups Regarding Volume Discounts

APPA supports ACA's recommendation that the Commission clarify that, under the program access rules, cable-affiliated programmers are required to extend to buying groups the same volume discounts or other advantageous terms and conditions based on the number of subscribers that they would ordinarily extend to individual MVPDs providing the same number of subscribers. APPA believes that the statutory language and FCC legislative history of Section 628 strongly support this. Indeed, as the Commission itself notes in the *FNPRM* "neither Section 628 nor the Commission's rules

distinguish between individual MVPDs and buying groups in describing the justifications for volume discounts." *FNPRM* at ¶ 97.

C. Buying Groups Should Be Prohibited from Unreasonably Denying Membership to Otherwise Qualified MVPDs

APPA supports the Commission's proposal to prohibit buying groups from "unreasonably" denying membership to any MVPD requesting membership. As the Commission notes, buying groups have significant leverage and power in the marketplace today and are of particular importance to the viability of small MVPDs. It is therefore of critical importance that otherwise qualified entities not be unreasonably denied access to such buying groups for unfair or anticompetitive purposes.

As is evidenced by the other proposed rules in this proceeding concerning buying groups, the Commission recognizes the vital role that such buying groups play in ensuring competitive access to video programming by smaller MVPDs. As a result, the Commission seeks to provide such buying groups greater parity under the rules to better serve their members. At the same time, this parity also requires that if buying groups are going to be able to avail themselves of the benefits and protections of Section 628, that they must also be subject to its prohibitions on unfair practices that hinder access to programming.

APPA disagrees with ACA's assertion that such a rule would needlessly interject duplicative Commission oversight into an issue that is already subject to adequate regulatory control through antitrust law. As discussed above, and in the *FNPRM*, Section 628 prohibits "unfair methods of competition or unfair or deceptive acts or practices." Section 628(b) is thus considerably broader in scope than the antitrust laws, and does not depend on proof that the Defendants *also* violated the antitrust laws.

Indeed, Section 628(b) is virtually identical to Section 5(a)(1) of the Federal Trade Commission Act. As the courts have often held, Section 5(a)(1) encompasses, but is not limited by, the antitrust laws. Likewise, the courts have also frequently held that, unlike the Department of Justice enforcing the antitrust laws, the Federal Trade Commission need not wait for misconduct to reach its full maturity, but can act early on to stem unfair practices before they result in significant harm.

For example, in *Federal Trade Commission v. Motion Picture Advertising Service*, 344 U.S. 392 (1953), the Supreme Court succinctly summarized these principles as follows:

> The "Unfair methods of competition," which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, 15 U.S.C.A. §§ 1-7, 15 note. *Federal Trade Commission v. Keppel & Bro.*, 291 U.S. 304, 54 S.Ct. 423, 78 L.Ed. 814. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, 291 U.S. at 310-312, 54 S.Ct. at 425-426. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act, see *Federal Trade Commission v. Beech-Nut Co.*, 257 U.S. 441, 453, 42 S.Ct. 150, 154, 66 L.Ed. 307 - to stop in their incipiency acts and practices which, when full blown, would violate those Acts, see *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 463, 466, 61 S.Ct. 703, 706, 707, 85 L.Ed. 949, as well as to condemn as "unfair method of competition" existing violations of them. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 691, 68 S.Ct. 793, 798, 92 L.Ed. 1009.

Id., at 394-95; *see also FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972); *Federal Trade Commission v. Brown Shoe Company, Inc*., 384 U.S. 316, (1966). The same principles apply under Section 628(b).

As the Commission has repeatedly found, Congress charged the Commission with the power and responsibility to treat Section 628(b) as a "clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the

statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming."[9] Adopting the proposed rule would advance the pro-competitive purposes of this provision.

It is important to note that, under the Commission's proposal, a buying group would not be required to accept all applicants. For example, as the Commission noted, if an MVPD seeking membership had a history of defaulting on its payments for programming, or if there were other legitimate reasons for denying membership to a particular MVPD, then the buying group's denial of membership would not be "unreasonable."

To be sure, as ACA observes, buying groups must have flexibility to adopt reasonable membership criteria in order to organize themselves effectively and efficiently on behalf of their members. APPA also agrees with ACA's point that the Commission should not be required to delve into complex issues beyond its expertise and resources. But ACA's hands-off-buying-groups solution is untenable. The Commission cannot give buying groups a blank check to discriminate among similarly-situated qualified entities or to adopt other policies and practices that would violate Section 628. The Commission also has more than ample experience with competition issues and the cable industry to be able to make effective decisions in the relatively few cases that may arise in this area. If anything, the very possibility of intervention by the Commission is likely to deter violations that might require remedial action by the Commission.

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[9] *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (*First Report and Order*) at ¶ 41, 8 FCC Rcd. 3359, 1993 WL 756291 (F.C.C.) (rel. April 30, 1993).

ACA is also mistaken in interpreting *Northwestern Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co*., 472 U.S. 284 (1985). *Northwest* does not say that the Commission would have to engage in a complex rule-of-reason antitrust analysis in order to review a buying group's membership decisions. To the contrary, the Supreme Court found in *Northwest* that there is no need for a rule-of-reason antitrust analysis if a buying group "possesses market power or exclusive access of an element essential to effective competition." *Northwest* at 296. In the *FNPRM*, at 9, the Commission quotes ACA itself for the proposition that buying groups possess market power and control access to an essential element for effective competition.

> As ACA submits, "[b]uying groups play an extremely important role in today's marketplace, for both small and medium-sized MVPDs," because they provide "significantly lower license fees for [their] members than these MVPDs could obtain through direct deals with programmers.

Given the acknowledged essential role that buying groups play in the marketplace, APPA submits that a rule-of-reason antitrust analysis would not be the proper test. As discussed above, the Commission has broad authority under Section 628 to reach anticompetitive practices that do not necessarily violate antitrust law. In its *First Report and Order* explaining the rules it adopted to implement Section 628, the Commission noted that Congress had given it broad authority to address both known and potential unfair conduct.[10] In recent years, the Commission has continued to interpret its authority under Section 628(b) expansively. For example, on November 13, 2007, the Commission issued an order prohibiting cable operators from entering into new exclusive

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[10] *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992 and Development of Competition and Diversity in Video Programming Distribution and Carriage*, MM Docket No. 92-265 (*First Report and Order*), 8 FCC Rcd. 3359, 1993 WL 756291 (F.C.C.) (rel. April 30, 1993).

cable service contracts, and from enforcing existing ones, at multiple dwelling units (MDUs).[11] This prohibition had nothing to do with the kinds of anticompetitive activities that Congress had emphasized in 1992. In fact, it did not even involve access to video programming. Rather, the *MDU Order* dealt solely with the unfair practices of cable operators in *retail sales* of cable service to customers in MDUs.

In the *MDU Order*, the FCC brushed aside the cable industry's plea for a narrow reading of Section 628(b). Among other things, the FCC stated:

> Contrary to commenters' suggestions, the Commission's authority under Section 628(b) is not restricted to unfair methods of competition or unfair or deceptive practices that deny MVPDs [multichannel video programming distributors] access to programming. Section 628(b) is not so narrowly drawn. Anticompetitive practices can hinder or prevent MVPDs from providing programming to consumers either by blocking their access to programming or by blocking their access to consumers, and there is nothing in Section 628(b) that suggests that the Commission's authority is limited to the former.[12]

On appeal, the D.C. Circuit exhaustively examined the language, structure, and legislative history of Section 628, and it concluded that the Commission's rationale in the *MDU Order* was correct:

> In the end, petitioners are unable to satisfy their heavy burden [under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)]. To prevail at *Chevron* step one, they must show that section 628(b) is unambiguously limited to Congress's principal concern with unfair program hoarding. Because Section 628's actual words reach the behavior the Commission prohibited, petitioners are left to argue "that the Commission relies almost entirely on a literal reading of the statutory language – not the most damning criticism when it comes to statutory interpretation." *Consumer Elecs. [Ass'n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003)], at 297 (internal quotation marks and citation omitted). And while

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11 *In* the *Matter of Exclusive Service Contracts For Provision of Video Services In Multiple Dwelling Units and Other Real Estate Developments*, 2007 WL 3353544 (rel. November 13, 2007).

12 Id. at ¶ 44.

> the statute's text, structure, and history do support the proposition that Congress was, in fact, principally concerned with program hoarding, none suggests that Congress chose its language to limit the Commission to regulating that evil alone. Indeed, having employed all available tools of statutory construction, we find little that suggests any congressional intent to limit section 628(b) to competition for programming, and so are unable to conclude that a reading literally permitted is nonetheless unambiguously foreclosed. At the very best, petitioners have demonstrated some ambiguity as to whether Congress intended to allow regulation of exclusivity contracts along with unfair dealing over programming-ambiguity the Commission reasonably resolved in favor of its own interpretation. Thus, concluding that section 628(b) authorizes the Commission's action, we need not consider the Commission's ancillary authority.[13]

More recently, the Commission relied on the same rationale in holding that Section 628 not only bars exclusive contracts for video programming delivered by satellite, but also for video programming delivered terrestrially. After reviewing its prior decisions and the D.C. Circuit's affirmance of the *MDU Order*, the Commission concluded:

> The Commission . . . has explained previously that it is not limited to addressing only the specific unfair acts listed in Section 628(c)(2); rather, "Section 628(b) is a clear repository of Commission jurisdiction to adopt additional rules or to take additional action . . . should additional types of conduct emerge as barriers to competition." Here, the record reflects evidence that unfair acts involving terrestrially delivered, cable-affiliated programming have occurred; such conduct is likely to persist absent Commission action; and this conduct can have the effect in some cases of hindering significantly an MVPD from providing satellite cable programming or satellite broadcast programming to subscribers and consumers. Thus, the plain language of Section 628(b), along with the authority provided by Section 628(c)(1) to adopt rules addressing conduct prohibited by Section 628(b), provide us with authority to adopt rules for the consideration of complaints alleging unfair acts with respect to terrestrially delivered, cable-affiliated programming.[14]

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13 *National Cable & Telecommunications Association. v. Federal Communications Commission*, 567 F.3d 659, 666 (D.C. Cir. 2009).

14 *In the Matter of Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements* ("*Terrestrial Order"*), ¶ 20, 2010 WL 236800 (F.C.C.) (rel. January 10, 2010) (footnotes omitted).

In its *Terrestrial Order*, the Commission underscored that the key consideration in determining whether an action violates Section 628 is whether it impairs the complainant's ability to be competitive and to offer cable programming *in general*, including satellite-delivered video programming, to subscribers and consumers.[15] All of this is equally applicable to the Commission's authority and ability to undertake and enforce the proposed rule under Section 628.

Moreover, the Commission has ample experience and tools to conduct such investigations under Section 628 and its general complaint procedures. In contrast, requiring small cable system operators to undertake full blown antitrust litigation to enforce a discrimination complaint against a buying group would all but foreclose such challenges, since few, if any, small systems would be willing or able to undertake the time and expense necessary to conduct such a challenge.

Finally, as stated previously, the very possibility of Commission intervention will likely act as a disincentive to unfair practices while at the same time helping to ensure that the advantages of participating in a buying group are widely available, thereby helping to foster competition in video services.

IV. CONCLUSION

Based on all of the above, APPA submits that the Commission should adopt the proposed rebuttable presumptions with respect to RSNs and national sports networks. The Commission should also adopt the recommendations herein with respect to the treatment of buying groups.

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[15] *Id.*, at ¶ 39

Respectfully submitted,

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